158-538

155-538

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 946.

LEM MOON SING, APPELLANT,

vs.

THE UNITED STATES ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

FILED MARCH 15, 1895.

(15,830.)

(15,830.)

SUPREME COURT OF THE UNITED STATES.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 16, 1895.

1 In the District Court of the United States, Northern District of California.

In the Matter of the Application of LEM MOON SING for a Writ of *Habeas Corpus*. No. 11151.

To the honorable the district court of the United States in and for the northern district of California:

And now comes Lem Moon Sing, the petitioner above named, by Lim Lung, and makes this his petition and complaint to this honorable court and respectfully shows:

I.

That the above-named Lem Moon Sing is a person of the Chinese race born in China and not a naturalized citizen of the United States, and that at all the times herein mentioned, and more especially at the time of the passage of the act of Congress approved August 18th, 1894, and entitled "An act making an appropriation for sundry civil expenses of the Government for the fiscal year ending June 30th, 1895, and for other purposes," he was, always has been, and still is a Chinese merchant within the limits of the United States and having his permanent domicile therein and actually engaged in mercantile pursuits and not otherwise, and was and is a merchant of said United States and acquired the right to come and go of his own free will and was and is entitled to remain in the United States in that he had his established domicile and national character as such merchant within the United States at the time of the
2 passage of the act hereinbefore referred to and has never surrendered or renounced such domicile or been without the United States except at the time of his departure therefrom for China on about the 30th day of January, 1894, on a temporary visit to China in the course and conduct of his said business and with the intention to return to the United States to continue to live and reside therein and pursue his said mercantile business.

II.

That the said Lem Moon Sing, at the time of his said departure for China, on about the 30th day of January, 1894, was a merchant and a member of the firm of Kee Sang Tong & Co., engaged in buying and selling merchandise at a fixed place of business, to wit, 722 Clay street, in the city and county of San Francisco, State and northern district of California; that he conducted such business, as hereinbefore stated, in his name for a period of more than two years prior to his said departure for China, and that during said time he was not engaged in the performance of any manual labor, except such as was necessary in the conduct of his said business as such merchant, and that during all the aforesaid time until the date of his said departure for China upon a temporary visit he

had his permanent domicile and residence at the address above referred to, in said city and county, and he has actually lived and resided therein.

III.

That the business conducted by the said Lem Moon Sing and his partners at the place hereinbefore alleged was that of wholesale and retail druggists; that the stock of said store was and is of the
3 value of about $20,000, and that said firm is doing a business of about $30,000 a year; that all the money owned by said Lem Moon Sing is invested in said business and all that he possesses is here in the United States.

IV.

That said Lem Moon Sing has been heretofore and for many years prior to the passage of the said act of Congress hereinbefore referred to and approved August 18th, 1894, lawfully admitted into the United States as a merchant and one of the exempt classes, and acquired, established, and enjoyed a domicile therein, and was, under the terms of all the treaties between the United States and China, accorded all the rights, privileges, immunities, and exemptions which were accorded to the citizens and subjects of the most favored nation, and had come to the United States with the intention of remaining and taking up his residence therein, and in pursuance of the invitation extended to him and at the time to all other Chinamen under the provisions of the 5th and 7th articles of the additional articles to the treaty between the United States of America and the Ta Tsing Empire, 18th of June, 1858, concluded and signed on the 28th of July, 1868 (Burlingame treaty), which then and there declared that the United States and China "cordially recognize the inherent and inalienable right of man to change his home and allegiance and also the mutual advantage of free migration and emigration of their citizens and subjects respectively from the one country to the other for purposes of curiosity, of trade, or as permanent residents," and further declared that "Chinese subjects * * * residing in the United States shall enjoy the same privileges, immunities, and exemptions in respect * * * to residence as may there be enjoyed by the citizens or subjects of the most favored nation."

4 V.

That the said Lem Moon Sing returned from China to the said United States on the Occidental & Oriental Steamship Company's steamer Belgic on the 3rd day of November, 1894, and applied to John H. Wise, as collector of customs at the port of San Francisco, to be permitted to land and for entrance into the United States on the ground that he was formerly engaged therein as a merchant, and that the said Lem Moon Sing then and there established, by the testimony of two credible witnesses other than Chinese, the facts that he conducted such business as a merchant for one year before his departure from the United States, as hereinbefore set forth, and

that during said year he was not engaged in the performance of any manual labor except such as was necessary in the conduct of his business as such merchant, and said application was denied, and by and under said denial D. D. Stubbs, as the secretary and manager of the said Occidental & Oriental Steamship Company, wrongfully and unlawfully imprisons, detains, confines, and restrains of his liberty the said Lem Moon Sing, and, as your petitioner is informed and believes, in violation of the provisions of the Constitution of the United States and of the laws thereof and of all the various treaties made and entered into between the United States of America and the Chinese Empire.

VI.

That the said Lem Moon Sing has not been apprehended and is not detained by virtue of any judgment, order, or decree, or other judicial process of any court or under any writ or warrant, but by virtue of the alleged power and authority alleged to have
5 been given to the said collector of the port by and under the provision of said act of Congress approved August 18th, 1894, and entitled "An act making an appropriation for sundry civil expenses of the Government for the fiscal year ending June 30th, 1895, and for other purposes," and in the following language: "In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigation or customs officer, if adverse to the admission of such alien, shall be final unless reversed on appeal to the Secretary of the Treasury."

And in that behalf your petitioner alleges that the said Lem Moon Sing was not at the date of the passage of said act or for more than one year prior to the date of his said departure for temporary purposes, as aforesaid, and is not now an alien excluded from admission into the United States under any law or treaty now existing, and that the said D. D. Stubbs and the said John H. Wise, collector of the port, so restraining the said Lem Moon Sing of his liberty, are without jurisdiction so to do.

VII.

And petitioner further alleges that if the said Lem Moon Sing should not be allowed to enter these United States and to return to his said residence and mercantile business therein and be sent from the United States back to China he would sustain great and irreparable loss and his business would be wholly destroyed, and he would be denied that equal right granted to him by the Constitution and the laws of the United States and by the treaties made
6 and existing between the United States and the Chinese Empire, of which he is a subject.

VIII.

That, as your petitioner is informed and verily believes, the said detention and restraint of liberty of said Lem Moon Sing is without

jurisdiction and void and unconstitutional, and that your petitioner is restrained of his liberty without due process of law and against his rights under the Constitution and the laws of the United States and the treaties made between the United States of America and the Chinese Empire and wrongfully and unlawfully under and by color of the authority of the United States asserted and exercised by the said John H. Wise, collector of the port of San Francisco.

That your petitioner is the partner of the said Lem Moon Sing and makes this application on his behalf.

Wherefore your petitioner prays that a writ of *habeas corpus* may be granted, directed to the said D. D. Stubbs and said John H. Wise, collector of the port of San Francisco, requiring them to forthwith produce the body of said Lem Moon Sing before this honorable court and there abide what shall be ordered by this honorable court in the premises, and that he may be restored to his liberty.

And your petitioner will ever pray.

LIM LUNG, *Petitioner.*
(Signature in Chinese.)
THOS. D. RIORDAN,
Attorney for Petitioner.

UNITED STATES OF AMERICA,)
State of California, City and County of San Francisco,) *ss.*:

Lim Lung, being duly sworn, says that he is the petitioner above named; that he has heard read the foregoing petition and knows the contents thereof; that the same is true of his own knowl-
7 edge; that he is a merchant residing and doing business in the firm of Kee Sang Tong & Co., 722 Clay street, in the city and county of San Francisco, State and northern district of California.

LIM LUNG.
(Signature in Chinese.)

Subscribed and sworn to before me this 6th day of March, 1895.
[NOTARIAL SEAL.] JNO. F. LYONS,
Notary Public in and for the City and County of San Francisco, State of California.

Endorsed: Petition for writ. Filed March 6th, 1895. Southard Hoffman, clerk, by J. S. Manley, deputy clerk.

8 At a stated term of the district court of the United States of America for the northern district of California, held at the court-room, in the city and county of San Francisco, on the sixth day of March, 1895.

Present: The Honorable W. W. Morrow, judge.

In the Matter of the Application of LEM MOON SING for a Writ of *Habeas Corpus.* No. 11151.

The matter of the application of Lem Moon Sing for a writ of *habeas corpus* this day came on for hearing before the court upon

the verified petition filed of record in said matter, and it appearing from said petition that the said Lem Moon Sing is not permitted to land and enter this country by John H. Wise, collector of the port at San Francisco, and that such power and authority are asserted and exercised by said collector by and under the provisions of an act of Congress approved August 18th, 1894, entitled "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30th, 1895, and for other purposes," and that this court is without jurisdiction by reason of the terms and provisions of the aforesaid act, and after hearing Thomas D. Riordan, attorney for said petitioner:

Now, therefore, it is ordered that the application for the issuance of a writ of *habeas corpus* as prayed for in said petition be, and the same is hereby, denied and said petition dismissed.

WM. W. MORROW,
U. S. District Judge.

(Endorsed:) Order declining to grant writ. Filed March 6th, 1895. Southard Hoffman, clerk, by J. S. Manley, deputy clerk.

9 In the District Court of the United States, Northern District of California.

In the Matter of the Application of LEM MOON SING for a Writ of *Habeas Corpus*. No. 11151.

Now, on this day, the said Lem Moon Sing having made and filed herein his verified petition, praying for the issuance of a writ of *habeas corpus*, and this court having heard and considered the facts alleged in said petition, and also the statement of his counsel in open court, and the court, being full- advised in the premises, having made and entered an order declining to grant the said writ because it appears on the face thereof that the said Lem Moon Sing is detained and restrained of his liberty by John H. Wise, collector of the port of San Francisco, by and under the provisions of the act of Congress approved August 18th, 1894, entitled, "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30th, 1895, and for other purposes," and that this court has no jurisdiction of the subject-matter of said petition, and that jurisdiction over the said petitioner lies within the power and authority of the said collector of the port of San Francisco:

Now, therefore, it is finally ordered, adjudged, and decreed that the prayer of the said petitioner for a writ of *habeas corpus* be denied, and that his said petition be, and the same is hereby, forthwith dismissed.

Done in open court this 6th day of March, 1895.

WM. W. MORROW,
U. S. District Judge.

Endorsed: Judgment. Filed March 6th, 1895. Southard Hoffman, clerk, by J. S. Manley, deputy clerk.

10 United States District Court, Northern District of California.

In the Matter of the Application of LEM MOON SING for a Writ of *Habeas Corpus*. No. 11151.

The petitioner in the above-entitled proceeding, feeling himself aggrieved by the judgment heretofore made and entered herein in the district court of the United States in and for the northern district of California on the sixth day of March, 1895, declining to grant a writ of *habeas corpus* as prayed for in the petition herein and dismissing the petition, doth hereby appeal to the Supreme Court of the United States from the said judgment of said district court, and prays that the said appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said judgment was made and entered, duly authenticated, may be sent to the Supreme Court of the United States.

San Francisco, March 6th, 1895.

THOS. D. RIORDAN,
Attorney for Petitioner and Appellant.

(Endorsed:) Notice of appeal. Filed March 6th, 1895. Southard Hoffman, clerk, by J. S. Manley, deputy clerk.

Due service and receipt of a copy of the within is hereby admitted this 6th day of March, 1895.

H. S. FOOTE,
U. S. Attorney.

11 At a stated term of the district court of the United States of America for the northern district of California, held at the court-room, in the city and county of San Francisco, on the sixth day of March, 1895.

Present: Honorable W. W. Morrow, judge.

In the Matter of the Application of LEM MOON SING for a Writ of *Habeas Corpus*. No. 11151.

On motion of Thomas D. Riordan, attorney for the petitioner in the above-entitled matter, it is ordered that the appeal in the above-entitled proceeding be allowed as prayed for.

WM. W. MORROW,
U. S. District Judge.

(Endorsed:) Order allowing appeal. Filed March 6th, 1895. Southard Hoffman, clerk, by J. S. Manley, deputy clerk.

12 At a stated term of the district court of the United States of America in and for the northern district of California, held at the court-room, in the city and county of San Francisco, on the sixth day of March, 1895.

Present: Honorable W. W. Morrow, judge.

In the Matter of the Application of LEM MOON SING for a Writ of *Habeas Corpus*. No. 11151.

Upon all the papers and proceedings herein and in pursuance of the provisions of section 765 of the United States Revised Statutes and upon motion of Thomas D. Riordan, attorney for petitioner in the above-entitled proceeding, it is—

Ordered that a transcript of the petition and all papers, writings, order, judgment, and other proceedings herein be sent up to the United States Supreme Court by the clerk of this court on or before the 20th day of March, 1895, and that said day be and the same is made the return day of the appeal heretofore allowed herein.

WM. W. MORROW,
U. S. District Judge.

Dated March 6th, 1895.

(Endorsed:) Order for return to U. S. Supreme Court. Filed March 6th, 1895. Southard Hoffman, clerk, by J. S. Manley, deputy clerk.

13 United States District Court, Northern District of California.

In the Matter of the Application of LEM MOON SING for a Writ of *Habeas Corpus*. No. 11151.

Know all men by these presents that we, Toy Ling Ang and L. Selenger, are held and firmly bound unto the United States of America in the sum of five hundred dollars, to be paid to the said obligees; for the payment of which, well and truly to be made, we bind ourselves and each of us and our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 6th day of March, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas the above-named Lem Moon Sing has presented an appeal to the Supreme Court of the United States to reverse the judgment declining to grant the writ of *habeas corpus* herein heretofore made in the above-entitled proceeding on the sixth day of March, 1895, by the district court of the United States in and for the northern district of California and duly entered on said day in the office of the clerk of said court:

Now, therefore, the condition of the obligation is such that if the above-named Lem Moon Sing shall prosecute said appeal
14 to effect and answer all damage and costs if he fail to make his appeal good, then this obligation shall be void; otherwise the same shall remain in full force and effect.

L. SELENGER.
TOY LING ANG.
(Signature in Chinese.)

Acknowledged before me this 6th day of March, 1895.

JOHN FONGA,
Commissioner U. S. Circuit Court,
Northern District of California.

UNITED STATES OF AMERICA,
Northern District of California,
City and County of San Francisco, } *ss:*

Toy Ling Ang and L. Selenger, being severally duly sworn, each for himself deposes and says that he is worth the sum of five hundred dollars over and above his just debt and liabilities.

L. SELENGER.
TOY LING ANG.
(Signature in Chinese.)

Subscribed and sworn to before me this 6th day of March, 1895.

JOHN FONGA,
Commissioner U. S. Circuit Court,
Northern District of California.

Approved:
WM. W. MORROW,
United States District Judge,
Northern District of California.

(Endorsed:) Recognizance on appeal. Filed March 6th, 1895. Southard Hoffman, clerk, by J. S. Manley, deputy clerk.

15 In the United States Supreme Court.

In the Matter of the Application of LEM MOON SING for a Writ of *Habeas Corpus.*

LEM MOON SING, Appellant and Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA and JOHN H. WISE, Individually and as Collector of Customs at the Port of San Francisco, within the Northern District of California, and D. D. Stubbs, Individually and as Secretary and Manager of the Occidental and Oriental Steamship Company, Respondents and Defendants in Error.

UNITED STATES OF AMERICA, *ss:*

To the United States of America and John H. Wise, individually and as collector of customs at the port of San Francisco, within the northern district of California, and D. D. Stubbs, individually and as secretary and manager of the Occidental and Oriental Steamship Company:

You are hereby cited and admonished to be and appear at the United States Supreme Court to be holden at Washington, in the

District of Columbia, on the 20th day of March, one thou-
16 sand eight hundred and ninety-five, pursuant to an appeal taken, allowed, and filed in the office of the clerk of the district court of the United States in and for the northern district of California, wherein Lem Moon Sing is appellant and The United States of America and John H. Wise, individually and as collector of customs at the port of San Francisco, within the northern district of California, and D. D. Stubbs, individually and as secretary and manager of the Occidental and Oriental Steamship Company, are respondents, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WM. W. MORROW,
U. S. District Judge.

Dated March 6th, 1895.

(Endorsed:) Citation. Filed March 6th, 1895. Southard Hoffman, clerk, by J. S. Manley, deputy clerk.

Due service and receipt of a copy of the within is hereby admitted this 6th day of March, 1895.

H. S. FOOTE,
U. S. Attorney.

17 In the Supreme Court of the United States.

In the Matter of the Application of LEM MOON SING for a Writ of *Habeas Corpus.*

LEM MOON SING, Appellant and Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA and JOHN H. WISE, Individually and as the Collector of Customs at the Port of San Francisco, within the Northern District of California, and D. D. Stubbs, Individually and as Secretary and Manager of the Occidental and Oriental S. S. Co., Respondents and Defendants in Error.

Afterwards comes the said Lem Moon Sing, by Thomas D. Riordan, his attorney, and says that in the record and proceedings in the above-entitled matter there is manifest error, in this, to wit:

1st. That the district court of the United States in and for the northern district of California erred in declining to grant the application for the writ of *habeas corpus* and dismissing the petition filed herein because that provision of the act of Congress approved August 18th, 1894, and entitled "An act making an appropriation for sundry civil expenses of the Government for the fiscal year ending
June 30th, 1895, and for other purposes," and in the follow-
18 ing language, "In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made the decision of the appropriate customs or immigration officer, if adverse to the admission of such alien, shall be final unless reversed on appeal to the Secretary

of the Treasury," does not relate or apply to or in anywise affect, concern, or control persons of Chinese descent who are merchants and of the exempt class and who had, prior to the passage of this act, lawfully acquired a domicile and residence within the United States and had been admitted into the United States pursuant to law and who still have and retain such domicile and residence and carry on and conduct their business within the United States.

2nd. That each and every part of said provision of law hereinbefore mentioned *in hac verba*, in so far as the same relates or applies to or in anywise affects, concerns, or controls such class of Chinese residing in the United States and intending so to do, was and is unconstitutional and void and of no effect.

3rd. That said district court of the United States in and for the northern district of California erred in not holding, adjudging, and determining that the said provision of said act of Congress approved August 18th, 1894, and in paragraph 1 thereof, hereinbefore stated, did not confer any power or authority on the collector of customs of the port of San Francisco or in any customs or immigration officer to deprive the said Lem Moon Sing of his liberty, in this, that under its provisions and the provisions of the Constitution and the laws of the United States and the several treaties entered into by the United States with China the said Lem Moon Sing
19 was then and there not excluded by any law or treaty from entering into the United States and was entitled to come in and reside there and to enjoy the domicile theretofore enjoyed by him therein and to come and go of his own free will, and that such restraint of his liberty, being without power or authority conferred by Congress, was without due process of law and in violation of the 5th amendment of the Constitution of the United States.

4th. That said district court of the United States in and for the northern district of California erred in holding, adjudging, and determining that the said provision of said act of Congress approved August 18th, 1894, did confer upon said collector of customs the power and jurisdiction to restrain the liberty of said Lem Moon Sing and to adjudge and order that he be excluded from the United States and remanded to China, and that said district court was without jurisdiction to hear and determine the facts set forth in the petition for *habeas corpus* made and filed herein and to dispose of said petitioner as law and justice might require, in this, that the said Lem Moon Sing, being a Chinese merchant entitled to come in and reside in the United States and having been theretofore lawfully admitted into said country and permanently domiciled therein, was a person within its jurisdiction and entitled to the equal protection of the laws, and that the said provisions of said act of Congress by purporting and attempting to deprive the said Lem Moon Sing of the equal protection of the laws of the United States is in violation of the 14th amendment of the Constitution of the United States.

20 5th. That the said district court of the United States erred in not holding, adjudging, and determining that the said provision of said act of Congress approved August 18th, 1894, was unconstitutional, void, and of no effect in and because it attempted

and purported to deprive the said Lem Moon Sing of his property without due process of law, in violation of the 5th amendment of the Constitution of the United States, in this: that by reason of the extraordinary authority purported to be vested by said act in the appropriate customs officer the latter is provided with the power to deport out of the country the said Lem Moon Sing without any opportunity for him to arrange or dispose of his property interest therein and thereby forfeiting and losing all his property and money in the United States.

6th. That the said district court of the United States erred in not holding, adjudging, and determining that the said act of Congress approved August 18th, 1894, and hereinbefore stated, was unconstitutional, void, and of no effect, in that it purports and attempts to invest in a customs officer the judicial power of the United States over persons of Chinese descent entitled to remain in the United States and who have been lawfully admitted into it and acquired a domicile therein and are engaged in lawful commercial pursuits and are of the exempt class not excluded by any law or treaty.

7th. That the said district court of the United States erred in not holding, adjudging, and determining that the said provision of said act of Congress approved August 18th, 1894, hereinbefore stated, was in violation of the various treaties between the United States of America and the Empire of China and therefore void and of no effect.

21 8th. That the said district court of the United States erred in not holding, adjudging, and determining that the said provision of the said act of Congress approved August 18th, 1894, hereinbefore stated, was unconstitutional, void, and of no effect.

9th. That the said district court of the United States erred in not holding, adjudging, and determining that the said provision of said act of Congress approved August 18th, 1894, and hereinbefore stated, was unconstitutional, void, and of no effect, in that the same was in violation of the 4th, 5th, and 6th amendments of the Constitution of the United States.

10th. That the said district court of the United States erred in not holding, adjudging, and determining that the said provision of said act of Congress approved August 18th, 1894, and hereinbefore stated, was an attempt on the part of the Congress of the United States to enact legislation which it had no power to enact, either by any express powers conferred upon it by the Constitution or by any amendments thereto or by any incidental power which may be exercised in their behalf.

11th. That the said district court of the United States erred in not holding, adjudging, and determining that the said D. D. Stubbs and the said collector of customs at the port of San Francisco had no authority to detain the said Lem Moon Sing, or to restrain him of his liberty, or to exclude him from the United States and to deport him to China.

12th. That the said district court of the United States erred in not granting the application of said Lem Moon Sing for a writ of *ha-*

beas corpus upon his said petition made and filed in said court in said matter and erred in dismissing said petition.

22 Wherefore the said Lem Moon Sing prays that the judgment of the said district court of the United States in and for the northern district of California, entered in the office of the clerk of said court on the 6th day of March, 1895, declining to grant the application for a writ of *habeas corpus* upon the aforesaid petition made and filed therein and dismissing the said petition be reversed, and that the said district court of the United States be ordered to enter an order granting the said application for a writ of *habeas corpus*.

THOS. D. RIORDAN,
Attorney for Appellant.

(Endorsed:) Assignment of errors. Filed March 6th, 1895. Southard Hoffman, clerk, by J. S. Manley, deputy clerk.

Due service and receipt of a copy of the within is hereby admitted this 6th day of March, 1895.

H. S. FOOTE,
U. S. Attorney.

23 UNITED STATES OF AMERICA, }
Northern District of California, City and County of San Francisco, } *ss:*

I, Southard Hoffman, clerk of the district court of the United States for the northern district of California, do hereby certify the foregoing and hereunto annexed twenty-one pages, numbered from one (1) to 21, inclusive, constitute the transcript on appeal from said district court to the Supreme Court of the United States in the matter of the application of Lem Moon Sing for a writ of *habeas corpus*, No. 11151.

Seal of the U. S. District Court, Northern Dist. of California.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at San Francisco, in said district, this 6th day of March, A. D. 1895.

SOUTHARD HOFFMAN,
Clerk U. S. District Court, Northern District of California.
By J. S. MANLEY, *Deputy Clerk.*

[Endorsed:] No. —. Supreme Court of the United States. In the matter of the application of Lem Moon Sing for a writ of *habeas corpus*. Lem Moon Sing, appellant and pl'ff in error, *vs.* The United States of America *et al.*, respondents and def'ts in error. Transcript on appeal.

Endorsed on cover: Case No. 15,830. N. California D. C. U. S. Term No., 946. Lem Moon Sing, appellant, *vs.* The United States *et al.* Filed March 15th, 1895.

Office Supreme Court, U. S.
FILED.
APR 6 1895
JAMES H. McKENNEY,
CLERK.

United States Supreme Court.

OCTOBER TERM, 1894.

No. 946

IN THE MATTER OF THE APPLICATION OF LEM MOON SING, FOR A WRIT OF HABEAS CORPUS.

LEM MOON SING,
Appellant,
against
THE UNITED STATES ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR APPELLANT.

MAXWELL EVARTS,
Of Counsel.

C. G. Burgoyne, Walker and Centre Streets, N. Y.—1895.

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1894.

No. 946.

In the Matter

of

The Application of Lem Moon Sing for a Writ of *Habeas Corpus*.

Lem Moon Sing,
Appellant,

against

The United States et al.

Appeal from the District Court of the United States for the Northern District of California.

BRIEF FOR APPELLANT.

Statement of Facts.

The appellant Lem Moon Sing is a person of the Chinese race, born in China, and not a naturalized citizen of the United States. Many years ago he was admitted into this country as a merchant

and established here his residence, making this country his commercial domicile as well as the domicile of his choice. For more than two years prior to his departure on business to China, on the 30th day of January, 1894, the appellant and his partner, Lim Lung, were engaged, as they still continue to be, in the business of wholesale and retail druggists, at 722 Clay street, San Francisco, California (Rec., pp. 1 and 4). The stock carried by the firm is worth about twenty thousand dollars ($20,000), and the value of the annual business done by it is in the neighborhood of thirty thousand dollars ($30,000) (Rec., p. 2). All the money of the appellant is invested in his business in San Francisco, and all the property which he possesses is here in the United States (Rec., p. 2).

On the 30th of January, 1894, in the course of his business, the appellant went to China for a temporary visit, with the intention of returning as soon as possible (Rec., p. 1). During his absence an Act of Congress was passed, approved August 18th, 1894, and entitled, "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-five, and for other purposes." This act provided, among other things, that "in every case where an alien is excluded from admission into the United States, under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs offices, if adverse to the admission of such alien, shall be final unless reversed on appeal to the Secretary of the Treasury" (Chap. 301, p. 390, Stat. of 1893-1894).

Returning from China, Lem Moon Sing arrived at the port of San Francisco on the 3d of November, 1894, and applied to the Collector of Customs at said port for permission to land (Rec., p. 2). At the time the appellant made his application he established, as was required by the Act of Congress of November 3d, 1893, by two credible witnesses other than Chinese, that he had conducted the business of a wholesale and retail

druggist for more than one year before his departure from the United States on January 30th, 1894, and that during such year he was not engaged in the performance of any manual labor except such as was necessary in the conduct of his business as such merchant (Rec., pp. 2 and 3). The Collector of Customs denied the application of the appellant under an alleged power given to him by the Act of Congress above referred to of August 18th, 1894, and refused to permit him to land. Because of such refusal by the said Collector of Customs the manager of the Occidental and Oriental Steamship Company detained and imprisoned the appellant with the intention of returning him to China upon one of the steamers belonging to said steamship company.

Thereafter, and by reason of such detention by the manager of said steamship company, the said Lem Moon Sing, on the 6th day of March, 1895, applied to the District Court of the United States in and for the Northern District of California for a writ of *habeas corpus*. The application was denied by said Court upon the ground that, under the Act of Congress of August 18th, 1894, the decision of the Collector of Customs, as to the right of the appellant to re-enter this country, was final unless reversed by the Secretary of the Treasury, and could not be reviewed by the Federal Courts. An appeal was thereupon taken to this Court by the said Lem Moon Sing from the order denying the application for said writ.

POINT I.

The detention of the appellant by the manager of the Occidental and Oriental Steamship Company is contrary to the provision of the Fifth Amendment to the Constitution—that no person shall be deprived of his liberty without "due process of law."

The words "due process of law" must ever be construed in accordance with the peculiar circumstances of each case as it comes before the Court. As was said in Freeland vs. Williams, 131 U. S., 405, 418. "This phrase, 'due process of law,' has always been one requiring construction; and, as this Court observed long ago, never has been defined, and probably never can be defined, so as to draw a clear and distinct line, applicable to all cases, between proceedings which are by due process of law and those which are not."

It is, however, a controlling principle to be found running through all the decisions of this Court upon this question that any procedure which is arbitrary and oppressive and not in accordance with established usage is not "due process of law." "Law in its regular course of administration through courts of justice is due process, * * * and that due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice."

Leeper vs. Texas, 139 U. S., 462, 468.

Mr. Justice BRADLEY in Davidson vs. New Orleans, 96 U. S., 97, 107, stated the rule by which to determine whether a certain course of procedure was "due process of law" or not, as follows: "If found to be suitable or admissible in the special case it will be

adjudged to be 'due process of law;' but if found to be arbitrary, oppressive and unjust it may be declared to be not 'due process of law.'"

Referring to this phrase in his opinion in the case of the Bank of Columbia vs. Okely, 4 Wheat., 235, Mr. Justice JOHNSON said, at page 244:

"As to the words from *Magna Charta*, incorporated into the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."

Adopting, then, the rule laid down by this Court, the question arises whether it is "due process of law" to leave to an executive officer of the Government the final decision of the right of a domiciled resident to return to this country without the opportunity to have that decision reviewed by any Court. It may be suggested that this question has already been decided in the Japanese Exclusion Case, 142 U. S., 651, hereinafter referred to at length in another point of this brief; but, as we understand that case, it simply held that it was "due process of law" to permit an inspector of immigation to finally decide without appeal to the Courts the right of an alien immigrant to enter this country for the first time, and the Court in its decision was very careful to distinguish the case here presented from the case it was then deciding. At page 660 Mr. Justice GRAY said:

"It is not within the province of the judiciary to order that foreigners who have never been naturalized, *nor acquired any domicile or residence within the United States*, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national Government. As to such persons, the decisions of executive

or administrative officers, acting within powers expressly conferred by Congress, are due process of law."

A conclusion to be drawn from this case would seem to be that it is not "due process of law" to make the decisions of executive or administrative officers, as to the right of foreigners who have acquired a domicile or residence within the United States to enter this country, final and without the right of appeal to the courts. In other words, foreigners, who have made their domicile in this country, are to be treated as citizens, in so far as the provisions of the Constitution are concerned, and are entitled to the protection of the laws of the United States and the safeguards of the Federal Constitution to the same extent as if they were naturalized or native-born citizens of the United States.

This is the doctrine declared by this Court in regard to the Chinese race in the case of Yick Wo vs. Hopkins, 118 U. S., 356, where it was held that "those subjects of the Emperor of China who have the right to temporarily or permanently reside within the United States, are entitled to enjoy the protection guaranteed by the Constitution and afforded by the laws" (Syllabus).

This principle was reaffirmed in the Chinese Removal Cases, 149 U. S., 698, 724, where it was said by this Court, in the opinion delivered by Mr. Justice GRAY, "Chinese laborers, therefore, like all other aliens residing in the United States, for a shorter or longer time, are entitled, so long as they are permitted by the Government of the United States to remain in the country, to the safeguards of the Constitution and to the protection of the laws, in regard to their rights of person and of property, and to their civil and criminal responsibility."

In the case of Lau Ow Bew, 144 U. S., 47, 61, Mr. Chief-Justice FULLER stated that "by general international law, foreigners who have become domiciled in a country other than their own, acquire rights and must discharge

duties in many respects the same as possessed by and imposed upon the citizens of that country, and no restriction on the footing upon which such persons stand by reason of their domicile of choice, or commercial domicile, is to be presumed."

In the case of *In re* Hoover, 30 Fed. Rep., 51, 54, it was said:

"A Chinaman, a negro, a Hottentot, a white man, has the right to the protection of the United States within the limits of the country. * * * He may not be deprived arbitrarily of life or liberty, nor can his property be taken without just compensation or due process of law."

Assuming, therefore, as it would seem under the decisions of this Court we are warranted in doing, that, so far as protection under the Constitution and laws of this country is concerned, foreign residents and citizens stand on an equal footing, the question then resolves itself into this: Is it "due process of law" to leave the right of a citizen to enter this country to the arbitrary will of a collector of customs without an opportunity to appeal from his decision to a court? The mere statement of this proposition would seem to be sufficient. It is contrary to all our understanding of the principles of the Constitution as construed by the courts, that the liberty of an American citizen—that his right to go and come as he pleases—should be left to the arbitrary whim and caprice of another man. As was said in Gee Fook Sing vs. United States, 49 Fed. Rep., 146, 148, "any person alleging himself to be a citizen of the United States, and desiring to return to his country from a foreign land and that he is prevented from doing so without due process of law, and who on that ground applies to any United States Court for a writ of *habeas corpus*, is entitled to have a hearing and a judicial determination of the facts so alleged; and that no act of Congress can be understood or construed as a bar to such hearing and judicial determination."

If, then, the procedure enacted by the Act of August 18th, 1894, is as to citizens "an arbitrary exercise of

the powers of government unrestrained by the established principles of private rights," and therefore not "due process of law," and if, as we have seen, citizens and commercial residents of this country are equally within the protection of the Constitution, then it would seem to follow that the procedure, which is not "due process of law" in the case of the citizen, must also be not "due process of law" as regards the resident of the United States, who has made this country his commercial domicile and his home. The rights of the appellant, whatever they may be, which he has acquired by his residence and domicile here, are not lost by his temporary visit to China. His character as a domiciled resident of this country is unchanged by his absence from the United States on business, and when he returns to this country he retains the right to have the question of his entrance into its borders determined in accordance with the provisions of the constitution, *i. e.*, by "due process of law," and what is to constitute "due process of law" in such a case is unaffected by the fact that the resident of the United States had returned for a few months to the domicile of his origin. As was said in Lau Ow Bew vs. United States, 144 U. S., 47, 63: "We are of opinion that it was not intended that commercial domicile should be forfeited by temporary absence at the domicile of origin," from which it would seem to follow that the rights and privileges attached to, forming a part of, and resulting from, a commercial domicile in this country, and which really constitute all there is in, and all that is meant by, the expression "commercial domicile," have not been forfeited in this case by the appellant's temporary absence in China, and that therefore his detention by the manager of the Occidental and Oriental Steamship Company is without "due process of law," as the words are used in the Fifth Amendment to the Constitution, and that the statute, the procedure under which makes the decision of the Collector of Customs as to such detention final unless reversed by the Secretary of the Treasury, is, so far as regards this case, unconstitutional.

POINT II.

The appellant is not an alien "excluded from the United States under any law or treaty" of this country, and the decision of the Collector of Customs at the Port of San Francisco, refusing him admission into the United States, is, therefore, not "final, unless reversed on appeal to the Secretary of the Treasury," but can be reviewed on habeas corpus.

If it should be decided by this Court, that it is "due process of law" to leave the right of a domiciled foreigner to re-enter this country to the decision of a customs officer without an opportunity to appeal to the courts, then the question arises whether the appellant, under a proper construction of this act, comes within the terms thereof, for under the decision of Horner vs. United States (No. 2), 143 U. S., 570, in an appeal of this character the entire case is before the Court and the consideration thereof is not limited in any way simply to the constitutional question involved.

The clause of the Act of Congress of August 18th, 1894, which, in the opinion of the Court below, made the decision of the Collector of Customs excluding the appellant from this country final, unless reversed on appeal to the Secretary of the Treasury, is as follows:

"In every case where an alien is *excluded from admission into the United States under any law or treaty now existing or hereafter made*, the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury" (Chap. 301, p. 390, Statutes of 1893–1894).

It is to be observed that the only aliens over whom the Collector of Customs is given jurisdiction by this act

are those "excluded from admission into the United States" under some law or treaty. When an alien answering to that description appears before him, then it is for him alone to say whether such alien shall land or not, subject only to the opinion of the Secretary of the Treasury. His determination of the question can not be reviewed by writ of *habeas corpus* or otherwise than in the way provided by the statute, *i. e.*, by appeal to the Secretary of the Treasury. It has been held by this Court and it would seem to be no longer an open question that Congress may, if it sees fit, place in the hands of the Executive Department of the Government the supervision of the admission of aliens into this country, and leave the final determination of the right of an alien to land to inspectors and Collectors of Customs. "In such a case, as in all others, in which a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine or controvert the sufficiency of the evidence on which he acted" (Nishimura Ekiu vs. United States, 142 U. S., 651, 660).

We do not undertake to dispute this now well-settled principle, but we do say that before a decision by an executive officer in regard to the admission of an alien into the United States can be final and one not to be re-examined by a Federal Court upon a writ of *habeas corpus*, the alien so excluded must be one over whom such executive officer is given final jurisdiction. That is to say, the decision of the Collector of Customs in the present case is made final only in the instances specified in the law in question, which are cases of aliens "excluded from admission into the United States" under some law or treaty. When, therefore, an alien, who is not "excluded from admission into the United States" under some law or treaty, but has a clear and unquestionable right to

enter this country, applies to a Collector of Customs for permission to land and the Collector refuses such permission, it would seem that such decision of the Collector cannot be final, for the reason that he is not given a final jurisdiction in such cases. The law expressly enacts that the decision of the Collector shall be final if adverse to the admission of an alien, who is "excluded from admission into the United States" under some law or treaty. His final jurisdiction is therefore limited to such cases. And his decision, when adverse to their landing, in the case of aliens not excluded by any law or treaty from the United States, is not covered by the clause in question, and can be reviewed in the ordinary way by writ of *habeas corpus*.

The Government will no doubt rely upon the case of Nishimura Ekiu vs. United States, 142 U. S., 651, and claim that it is conclusive in the present controversy. The appellant in the case just cited was a Japanese woman. She was an alien immigrant, and was excluded from admission into the United States at San Francisco by one of the inspectors of immigration at that port upon the ground that she was prohibited from landing under the immigration laws. She then applied to the United States Circuit Court in the Northern District of California for a writ of *habeas corpus*, and the application was granted. After a hearing upon the writ the Circuit Court dismissed the same and the petitioner appealed to this Court, where the judgment of the lower Court dismissing the writ was affirmed. The clause of the Immigration Laws, which was immediately before the Court for its construction, and under which the Inspector of Immigration at San Francisco claimed that his decision of the matter was final, unless an appeal was taken to the Commissioner of Immigration, provided that "all decisions made by the inspection officers or their assistants touching the right of any alien to land, when adverse to such right, shall be final, unless appeal be taken to the Superintendent of Immigration, whose action shall

be subject to review by the Secretary of the Treasury" (Act of March 3d, 1891, C. 551, § 8).

The act before the Court in the Japanese case made the decision of the inspection officers "touching the right of *any* alien to land, when adverse to that right, * * * final, unless appeal be taken to the Superintendent of Immigration." The law now before us makes the decision of the appropriate immigration or customs officers final in regard to the right of an alien 'excluded from admission into the United States under some law or treaty' to land, if adverse to such right, unless reversed on appeal to the Secretary of the Treasury. In other words, the inspection officers in the Japanese case were given final jurisdiction over the cases of all alien immigrants, while in the present case the final jurisdiction of the immigration and customs officers is confined and limited to the cases of aliens 'excluded from admission into the United States under some law or treaty.' In short, the difference between the two cases is the very distinction pointed out by Mr. Justice GRAY in the opinion in the Nishimura case at page 663, where it is said:

"The words of Section 8 * * * were manifestly intended to prevent the question of an alien immigrant's right to land, when once decided adversely by an inspector, *acting within the jurisdiction conferred upon him*, from being impeached or reviewed in the courts or otherwise, save only by appeal to the inspector's official superiors."

The inspector in the Nishimura case had final jurisdiction over the cases of all alien immigrants. The Collector of Customs here had final jurisdiction only over certain aliens, and the appellant did not come within that class. His decision, therefore, as to the right of the appellant to land can be reviewed by the Federal courts upon a writ of *habeas corpus*, or at least such a review of the decision of the Collector is not precluded by the decision of the Japanese Exclusion Case.

In the case of *In re* Panzara *et al.*, 51 Fed. Rep., 275, the same statute was before the Court, which was construed by this Court in the Nishimura case. The petitioners were Italian aliens, residents of this country, returning from a visit to Italy. Upon their arrival at the port of New York, the Superintendent of Immigration ordered them sent back to Italy, and they had been placed on board the vessel, which brought them here, to be taken back in pursuance of such order, when they applied to the United States District Court for the Eastern District of New York for a writ of *habeas corpus*. The writ was issued, and upon the return thereof the petitioners were discharged, the Court holding that the Superintendent of Immigration had jurisdiction of alien immigrants only, whereas it appeared that the petitioners were not immigrants, but were residents of this country, who had acquired a domicile therein. It was said at page 276.

"The statute conferring power upon the Superintendent of Immigration to order the return of persons arriving in the United States from foreign countries confines his power to alien immigrants. He has no jurisdiction to direct the return to a foreign country of a person not an alien immigrant. The question whether the petitioner is an alien immigrant is therefore a jurisdictional one, and the finding of the Commissioner upon that question is not conclusive upon the courts. That question, when presented to the Court by a petition of *habeas corpus*, must be decided by the Court upon the evidence presented to the Court in such proceeding. And when, as here, the uncontradicted testimony presented shows in respect to each of the petitioners that he is not an alien immigrant, it becomes the duty of the Court to declare the order of the superintendent of immigration that the petitioner be returned to Italy to be void, and therefore affording no legal ground for the detention of the petitioners by the master of the ship."

In the Panzara case it was held that the superintend-

ent of immigration had final jurisdiction only as it was given him by the statute, viz., in cases of alien immigrants. Under the statute we are now considering the jurisdiction of the Collector of Customs is final only in cases of aliens excluded from admission into the United States under some law or treaty. The two cases would seem to be similar, and, if the principle of the Panzara case is correct, it would appear to apply to the case before us.

See also *In re* Martorelli, 63 Fed. Rep., 437.

The facts presented in the petition of the appellant disclose the case of an alien, whose right to enter this country is not forbidden by any law or treaty of this country. These facts are undisputed and uncontradicted. In such a situation it would seem as if the writ of *habeas corpus* should issue and an examination be had, as to the truth of the allegations of the petition. That the allegations of a petition for a writ of *habeas corpus* are true, must be assumed by the Court to which it is presented, until they are disproved. Therefore, so far as the Court was concerned to which this application was made for a writ of *habeas corpus*, the case before it was that of an alien who was not excluded from admission into the United States under any law or treaty, and it would, therefore, seem to follow that, upon the petition, if true, which it must be taken to be, the Collector of Customs at the port of San Francisco did not have final jurisdiction of the case of this appellant under the law of August 18th, 1894, and that the Court below erred in declining to issue the writ of *habeas corpus*.

POINT III.

The appellant was not an "alien" within the proper meaning and construction of the word as used in the section of the Act of August 18th, 1894, now before the Court.

a.

The appellant was a merchant whose commercial domicile had been for many years in San Francisco. In January, 1894, he made, in due course of business, a short visit to China, with the intention of soon returning. He retained his interest in the drug business in California, and left all his money and property in America. While he was absent in China the law of 1894 was enacted, and the question is: Does it apply to him, or, as stated in the case of Lau Ow Bew vs. United States, 144 U. S., 47, 59:

"Does the section apply to Chinese merchants, already domiciled in the United States, who, having left the country for temporary purposes, *animo revertendi*, seek to re-enter it on their return to their business and their homes?"

In the case just referred to the appellant was a Chinese merchant who had established a home and business in this country. He went to China in September, 1890, upon a temporary visit with the intention of returning to America as soon as possible. He did so return on the 11th day of August, 1891. The Collector of the Port at San Francisco refused to permit him to land upon the ground that he had failed and neglected to produce the certificate of the Chinese Government mentioned in the 6th Section of the Chinese Restriction Act of May 6th, 1882, as amended by the Act of July 5th, 1884. The 6th Section of the act on which the Collector based his action provided that "every

Chinese person, other than a laborer, * * * *who shall be about to come to the United States*" should obtain a certificate from the Chinese Government, which should be "the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States." It is to be noticed that Lau Ow Bew came within the general terms of the section and was a Chinaman other than a laborer about to come to the United States from a foreign country. On being refused permission to land, he applied to the Circuit Court of the United States for the Northern District of California for a writ of *habeas corpus*, which was granted. Upon a dismissal of the writ by the latter Court the petitioner appealed to the United States Circuit Court of Appeals for the Ninth Circuit, which Court affirmed the judgment of the Court below dismissing the writ of *habeas corpus*. The case was then brought to this Court by *certiorari*, when the judgment below was reversed upon the ground that the 6th Section of the Act of May 6th, 1882, as amended, was only intended to apply to Chinamen coming to the United States for the first time. Mr. Chief-Justice FULLER, in delivering the opinion of the Court, said, at pages 61 and 62 :

"But Chinese merchants domiciled in the United States, and in China only for temporary purposes, *animo revertendi*, do not appear to us to occupy the predicament of persons 'who shall be about to come to the United States,' when they start on their return to the country of their residence and business. The general terms used should be limited to those persons to whom Congress manifestly intended to apply them, and they would evidently be those who are about to come to the United States for the first time, and, therefore, might properly be required to apply to their own government for permission to do so, as also to so identify them as to distinguish them as belonging to the classes who could properly avail themselves of such leave.

"By general international law, foreigners who have become domiciled in a country other than their own, acquire rights and must discharge duties in many respects the same as possessed by and imposed upon the citizens of that country, and no restriction on the footing upon which such persons stand by reason of their domicile of choice, or commercial domicile, is to be presumed; while, by our treaty with China, Chinese merchants domiciled in the United States, have, and are entitled to exercise, the right of free egress and ingress, and all other rights, privileges and immunities enjoyed in this country by the citizens or subjects of the 'most favored nation.'

"There can be no doubt, as was said by Mr. Justice HARLAN, speaking for the Court in Chew Heong vs. United States, 112 U. S., 536, 549, that, 'since the purpose avowed in the act was to faithfully execute the treaty, any interpretation of its provisions would be rejected which imputed to Congress an intention to disregard the plighted faith of the Government, and, consequently, the Court ought, if possible, to adopt that construction which recognized and saved rights secured by the treaty.'

"*Tested by this rule it is impossible to hold that this section was intended to prohibit or prevent Chinese merchants having a commercial domicile here from leaving the country for temporary purposes and then returning to and re-entering it, and yet such would be its effect if construed as contended for on behalf of appellee.*"

As far as this particular question is concerned, it is not at all plain how any distinction can be drawn between the Lau Ow Bew case and the case at bar. In both the petitioners were Chinese merchants domiciled in the United States, returning from a temporary visit in China, which had been undertaken with no intention of surrendering their residence in this country, but, on the contrary, with the settled determination to return to America at the earliest opportu-

nity. The general terms of the law in the former case clearly included Lau Ow Bew within its prohibition, and we concede for the purposes of this argument that the Act of August 18th, 1894, also by its provisions, covers the case of this appellant. If, therefore, as this Court has said, " Chinese merchants domiciled in the United States, and in China only for temporary purposes, *animo revertendi*, do not appear * * * to occupy the predicament of persons 'who shall be about to come to the United States,' when they start on their return to the country of their residence and business," then it would seem to follow that, under a proper construction, the act we are now discussing, should properly apply only to those aliens who have no residence or domicile in the United States ; *i. e.*, alien immigrants coming to this country for the first time, and that the appellant, therefore, does not come within the meaning of " alien," as used by Congress in this act.

It is to be borne in mind, in considering this whole question, that the law of 1894 is not limited in its application to the Chinese race. It is not legislation in the least directed against the Chinaman. On the contrary, it is general legislation applying to all aliens, no matter what their color or nationality may be. Turning then to the law most similar to the act in question, which by its terms included all aliens alike, we find that the Courts in construing its terms have held, as we maintain it should be decided here, that the word " aliens," taking all things into consideration, and more especially the purposes and objects of the legislation in which the word is used, were intended to refer, and did refer only to " alien immigrants." This was the precise point decided in *In re* Panzara, 51 Fed. Rep., 275, and in *In re* Martorelli, 63 Fed. Rep., 437, heretofore cited on this brief, and the distinction was evidently in the mind of this Court in the Japanese Exclusion Case, for there the portion of the law then before it covered by its terms " any alien," whereas the

decision was limited to the case of an "alien immigrant."

If the decision of the Collector of Customs at San Francisco, in the case of this appellant shall be held by this Court to be final, and not to be reviewed by writ of *habeas corpus*, then the effect of that decision will apply with equal force to the Englishman and the Canadian who have made their homes here and have returned temporarily to the domicile of their origin, and they, together with the Chinese, must go out from this country with the knowledge that their right to return to their homes and their business depends upon the will and caprice of a deputy collector or inspector of immigration, subject only to an appeal to the Secretary of the Treasury.

b.

If, however, the position we have taken that "alien" in the Act of August 18th, 1894, means "alien immigrant" should not be sustained by the Court, we then come to another and, as it would seem to us, a most important reason why this act should not apply to the case of this appellant and why the decision of the Collector of Customs refusing him entry into the United States should not be deemed final unless reversed by the Secretary of the Treasury.

Lem Moon Sing went to China in January, 1894. No law of the United States at the time of his departure left the question of his right of return in the hands of an executive officer of the Government without appeal to any court. At that time, under the laws of the United States and the treaties between that country and China, his right to re-enter this country was certain and clearly defined, and if, at that time, any attempt to prevent or impede the entrance of a foreigner domiciled here had been made by the Collector of the Port of San Francisco, such interference could have been re-

viewed by the Federal Courts. When the appellant went out of this country, he went with the understanding that his right to return did not depend upon the arbitrary whim of a government officer. While he was away, this law of August 18th, 1894, was passed. In view of the known hatred of his race by the people of California, it might very well be that the appellant would never have left this country, where all his money and property were invested, if such a law had been in existence, for fear of the very difficulty which has arisen here; but, however that may be, it would seem that an alien resident, returning temporarily to his domicile of origin for purposes of business or of pleasure, should not be affected, as to his right of return to the domicile of his choice, by any law there enacted during his absence, unless such law, by reason of its direct and positive language, will admit of no other interpretation. As was said in Harvey vs. Tyler, 2 Wall., 328, 347, "it is a rule of construction, that all statutes are to be considered prospective, unless the language is express to the contrary, or there is a necessary implication to that effect." We therefore maintain the proposition, without hesitation, that to hold an alien resident to be within the intent of a general law relating to the admission of aliens into this country, passed during his absence therefrom, would, in fact, be to give to such law a retrospective effect and operation. In short, if such a law is to apply alike to alien immigrants and to aliens returning from a temporary visit to a foreign country, as we do not think it should, then it must be assumed to be limited in its application to those alien residents, who leave the United States after the passage of the act so regulating and controlling their return.

In the case of Chew Heong vs. United States, 112 U. S., 536, the petitioner was a Chinese laborer. He came to this country in November, 1880, and remained here until June, 1881, when he went to Honolulu, where he remained until September, 1884. In the meantime and

during his absence in Honolulu, the two Chinese restriction acts of 1882 and 1884 had been passed, which required the production by an incoming Chinese laborer of a certain kind of certificate. This certificate Chew Heong, not knowing of the passage of the restriction acts while he had been in Honolulu, was unable to produce, and consequently the authorities of the United States at San Francisco would not permit him to land. He thereupon filed a petition for a writ of *habeas corpus* in the United States Circuit Court for the District of California, and the writ was ordered to issue. Upon the hearing on the writ, there was a division of opinion, the writ was discharged, and a certificate was entered of division of opinion upon several questions, among which was the following :

" Whether the provisions of Section (four) 4 of the 'Act to execute certain treaty stipulations relating to Chinese,' approved May 6, 1882, as amended by the act approved July 5, 1884, prescribing the certificate which shall be produced by Chinese laborers as the 'only evidence permissible to establish a right of re-entry' into the United States, are applicable to Chinese laborers who were residing in the United States on November 17, 1880, and who departed from the United States by sea prior to May 6, 1882, and remained out of the United States till after July 5, 1884."

In its opinion the Court said at pages 539, 559 and 560 :

" If, as claimed by plaintiff in error, the treaty of 1880, fairly interpreted, secured to him, at the time of his departure for Honolulu, the right to go from and return to the United States at pleasure, without being subjected to regulations or conditions affecting the substance of that right, the Court should be slow to assume that Congress intended to violate the stipulations of a treaty, so recently made with the Government of another country." * * *

" The entire argument in support of the judgment below proceeds upon the erroneous assumption that

Congress intended to exclude all Chinese laborers of every class who were not in the United States at the time of the passage of the Act of 1882, including those who, like the plaintiff in error, were here when the last treaty was concluded, but were absent at the date of the passage of that act. We have stated the main reasons which, in our opinion, forbid that interpretation of the Act of Congress. *To these may be added the further one, that the Courts uniformly refuse to give to statutes a retrospective operation, whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature.* In United States vs. Heth, 3 Cranch, 398, 413, this Court said, that 'words in a statute ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the Legislature cannot be otherwise satisfied;' and such in the settled doctrine of this Court. * * *

"So far from the Court being compelled, by the language of the Act of Congress, to give it a retrospective operation, the plain, natural and obvious meaning of the words—interpreted with reference to the general scope and the declared purpose of the statute—utterly forbids the conclusion that there was any intention to impair or destroy rights previously granted. * * * It would be a perversion of the language used to hold that such regulations apply to Chinese laborers who had left the country with the privilege, secured by treaty, of returning, but who, by reason of their absence when those legislative enactments took effect, could not obtain the required certificates. * * * A Chinese laborer, to whom a certificate was issued under the original act, is entitled to re-enter only upon producing that certificate; one, to whom a certificate was issued under the Act of 1884, is entitled to re-enter only upon producing such certificate; while the plaintiff in error, having left be-

fore any certificate was permitted to be issued, cannot be required to produce one before re-entering, because, having resided here on the 17th day of November, 1880, he was clearly entitled under the express words of the treaty, to go from and return to the United States of his own free will—a privilege that would be destroyed, if its enjoyment depended upon a condition impossible to be performed. The recognition of that privilege is entirely consistent with existing legislation ; for, by construing the original and amendatory acts, so far as they require the production of a collector's certificate by Chinese laborers, who were in the United States on the 17th of November, 1880, as applicable only to those of that class who were here at the dates when those acts, respectively, took effect, no previously acquired rights are violated, and full effect is given to the expressed intention of Congress to faithfully meet our treaty obligations. Thus, the legislation of Congress and the stipulations of the treaty may stand together."

The question presented here is not whether Congress has the power to take away the appellant's right to re-enter this country given him by treaty and vested in him when he left the United States, but whether Congress, by the Act of August 18th, 1894, did deprive or intended to deprive him of this right of re-entrance into the United States. The principle to be deduced from the Chew Heong case is that the terms of a treaty and of a subsequent Act of Congress are not to be construed as conflicting, unless such construction cannot be escaped. That is to say, this Government will be presumed to intend to preserve its faith with other nations and not to intend by any Act of Congress to take away a right which has vested and which the United States has solemnly agreed should be given to foreigners, unless the meaning of said Act of Congress is too plain to admit of any other interpretation. In short, the Act of Congress and the prior treaty must be reconciled, if it can be done. That it can be done in this case is very

clear, for there are no words in the act in question which indicate any intention on the part of Congress to take away any rights given by treaty and vested prior to the passage of the law of August 18th, 1894, and the "obvious meaning of the words—interpreted with reference to the general scope and declared purpose of the statute—utterly forbids the conclusion that there was any intention to impair or destroy rights previously granted" (Chew Heong Case).

The law of August 18th, 1894, if it does include within its terms alien residents, contains no definite and certain language which compels the inference that it applies to alien residents who were absent from the country when it was passed. No evidence of such intention is to be found in the act itself, for it is framed in the general terms of a general law.

Now, at the time the appellant went to China he had a clear and undisputed right to return to this country unembarrassed by any legislative requirement, except the provisions of Section 2 of the Act of Congress approved November 3d, 1893, which he has complied with. This right was given him by the Third Article of the Treaty between the United States and China of November 17th, 1880 (22 U. S. Stat., 826), which provided that, "Chinese subjects, whether proceeding to the United States as teachers, students, merchants * * * *shall be allowed to come of their own free will and accord*, and shall be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nation." To say therefore when he seeks to re-enter the United States that he can be excluded under an Act of Congress passed during his absence would be to give such Act of Congress a retrospective operation, which, as we have seen, is contrary to the settled law of this Court. It would, therefore, seem that it was error in the Court below to refuse to grant the writ of *habeas corpus*, for the reason that, under a proper construction of the Act

of Congress of August 18th, 1894, the Collector of the Port of San Francisco was not given final jurisdiction over the cases of alien residents who were absent on a temporary visit at their domicile of origin at the time of the passage of said act.

POINT IV.

The order of the Court below declining to issue the writ of habeas corpus should be reversed and the writ of habeas corpus be issued.

MAXWELL EVARTS,
Counsel for Appellant.

Office Supreme Court U. S.
FILED.
APR 13 1895
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

LEM MOON SING, APPELLANT,
v.
THE UNITED STATES ET AL. } No. 946.

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BRIEF FOR THE UNITED STATES.

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STATEMENT.

The statement in the brief for appellant correctly sets out the case made in the petition, but attention is called to the difference between this case and the one presented to the collector, whose action is complained of.

The petition shows that Lem Moon Sing, many years prior to August 18, 1894, was lawfully admitted into the United States as a merchant and as one of the exempt classes and acquired, established, and enjoyed a domicile

therein; that for more than two years before his departure for China he was a drug merchant in San Francisco and not a laborer, and that during all that time he had his permanent domicile and residence in San Francisco and actually lived there, and had conducted and still carried on a mercantile business in said city, and that he went to China in the conduct of his business temporarily and with the intention of returning to the United States to continue to live and reside therein and pursue his said mercantile business, and that he had never surrendered or renounced such domicile. (Rec., pp. 1, 2.)

He submitted to the jurisdiction of the collector of customs and adduced evidence, and his right to enter was investigated and passed upon. The petition shows he made the following case:

> And applied to John H. Wise, as collector of customs at the port of San Francisco, to be permitted to land, and for entrance into the United States, on the ground that he was formerly engaged therein as a merchant; and that the said Lem Moon Sing then and there established by the testimony of two credible witnesses other than Chinese the facts that he conducted such business as a merchant for one year before his departure from the United States, as hereinbefore set forth, and that during said year he was not engaged in the performance of any manual labor, except such as was necessary in the conduct of his business as such merchant; and said application was denied. (Rec., pp. 2, 3, Par. V.)

Nothing was shown in respect of his acquirement of a domicile, nor of his temporary absence in the conduct of his business with the purpose of returning, nor of his

still having a business and property in America. For all that appeared to the collector, he may have been a merchant who, being temporarily in America, carried on a business for a year without having given up his domicile in China, and who had abandoned the business and the country with no purpose of returning. Such a merchant could not have been admitted without a certificate. He, after applying to the collector and obtaining an adverse decision, did not appeal to the Secretary of the Treasury, but began this proceeding.

POINTS AND ARGUMENT.

I.

The court has discretion as to the issuance of the writ, and may decline to do so until an appeal shall have been prosecuted unsuccessfully before the Secretary of the Treasury.

When a person is detained under a jurisdiction which may be unconstitutional, the court is not bound to allow the writ pending the proceedings, and while the party has a right of appeal from the court of first instance, for he may be discharged upon appeal. (*Ex parte* Royall, 117 U. S., 252; *Ex parte* Fonda, 117 U. S., 51; *In re* Frederich, 149 U. S., 75; *New York* v. *Eno*, 155 U. S., 96.)

Lem Moon Sing had a right of appeal from the collector of customs to the Secretary of the Treasury. (28 Stat., 390.) It is not denied that the collector had jurisdiction, but only that his decision was final. If the collector erred, it is not to be assumed that the Secretary of the Treasury, upon a proper showing, would not cor-

rect the error. This was a speedy remedy, and it was not resorted to. It was not attended with great delay or expense, nor was it otherwise oppressive.

In *Ex parte* Royall (117 U. S., 252) this court said:

> Nor do their circumstances, as detailed in the petition, suggest any reason why the State court of original jurisdiction may not without interference upon the part of the courts of the United States pass upon the question which is raised as to the constitutionality of the statutes under which the appellant is indicted. The circuit court was not at liberty under the circumstances disclosed to presume that the decision of the State court would be otherwise than is required by the fundamental law of the land, or that it would disregard the settled principles of constitutional law announced by this court, upon which is clearly conferred the power to decide ultimately and finally all cases arising under the Constitution and laws of the United States.

In *Ex parte* Fonda (117 U. S., 516) the petitioner was convicted and sentenced to imprisonment by a State court and confined, contrary, as alleged, to the Constitution and laws of the United States, and in a matter over which the State court, it was claimed, had no jurisdiction. The petition was denied because he had a right of appeal to the State supreme court, and it was time enough for this court to act after a decision adverse to the prisoner.

The court said:

> The case as made by the motion papers is not one which, under the principles settled in Royall's Case, requires this court to act in advance of the orderly course of proceeding for a review of the judgment by writ of error.

If the court would not interfere in behalf of a citizen actually imprisoned by authority of a State, in alleged contravention of the Constitution of the United States, until the remedies by orderly procedure in the State courts were exhausted, how much less in the exercise of this discretion should it be inclined to interfere to disturb the orderly procedure established by Congress to cover such a vast number of cases as arise in the matter of entry of Chinese into the United States. Two cases of this character are now pending in this court.

Whatever may be said as to the unconstitutionality of the final act of the special tribunal provided by Congress in particular cases where the decision is adverse to the applicant, or as to the provision that the ultimate decision of the tribunal shall be final, there can be no question as to the wisdom of establishing at the ports of entry an expeditious method for investigation, and there can be no doubt that primarily and until final action, such a tribunal so established has jurisdiction. It is not denied in this case that the collector had jurisdiction.

Having jurisdiction, its action can not be unlawful until a final conclusion is reached adverse to the party complaining. The orderly course was abandoned, and this petition was filed, without any resort to the Secretary of the Treasury, and, as has been shown, upon a presentation widely different from that made to the collector. If the petition can be maintained now, then there need be no recognition of the collector of the customs, but every case, whether the party be a merchant, in fact or alleged, or a laborer, may be carried, in the first instance, over the heads of the col-

lector and the Secretary of the Treasury, and the courts can be flooded with cases, very many of which, it is fair to presume, would be otherwise determined lawfully and in the manner provided by Congress; and, as in this instance, all of these applications may present to the courts cases very different from those upon which the collector acted.

It is respectfully urged that, inasmuch as a discretion is allowed to the court, it would be in the interest of the public not to take cognizance of any complaint until the Secretary of the Treasury shall have acted adversely to the party in whose behalf the writ is sought. Otherwise every Chinese laborer may, upon making the necessary averments in a petition, have the courts try in the first instance whether he be in fact a laborer or a merchant.

II.

The detention of appellant is not contrary to the fifth amendment and without due process of law.

The act of August 18, 1894, under which appellant has been excluded, is as follows:

> In every case where an alien is excluded from admission into the United States, under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officer, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury. (28 Stat., 390.)

An alien has not the rights of a citizen of the United States to invoke the protection of the courts where the Government is exercising its political power of exclusion

or deportation. (*Fong Yue Ting* v. *United States*, 149 U. S., 710 *et seq.*; *Nishimura Ekiu* v. *United States*, 142 U. S., 660.)

The creation by Congress of a special tribunal, consisting of executive officers, for determining the right of an alien to enter or remain in the United States whose decision shall be final, is not unconstitutional. (*Nishimura Ekiu* v. *United States*, 142 U. S., 660–662; *Fong Yue Ting* v. *United States*, 149 U. S., 712, 728.)

The principle is the same which makes the appraisement of customs officers final and not subject to review by the courts, and which is constitutional and due process of law. (*Hilton* v. *Merritt*, 110 U. S., 107.)

The argument of this point proceeds upon the assumption that the act of August 18, 1894, applies, in its operation, to all Chinese merchants who have been domiciled in America and have returned temporarily to China, and that the right to return must be passed upon by the collector and, on appeal, by the Secretary of the Treasury, and that their action shall be final.

It is conceded in the brief for appellant that the Japanese Exclusion Case (142 U. S., 651) settles that Congress may pass such an act creating such a tribunal in respect of all aliens seeking to enter the United States, who have never acquired a domicile therein; but it is contended that such an act is unconstitutional so far as aliens who have acquired domiciles are concerned. In short, the right is denied to Congress to exclude, absolutely and unconditionally, aliens who have become domiciled in the United States.

This destroys the political power of Congress to deal with foreigners, and substitutes the power of the courts.

To sustain the contention, a passage from the opinion in the Japanese Exclusion Case, at page 660, is quoted, as follows:

> It is not within the province of the judiciary to order that foreigners who have never been naturalized, *nor acquired any domicile or residence within the United States*, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the National Government. As to such persons the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law.

The conclusion drawn from this in appellant's brief (p. 6) is that such power conferred by Congress upon executive officers in respect of aliens who had acquired a domicile in this country would not be "due process of law."

The language quoted from Mr. Justice Gray was that of exclusion. It differentiated the case at bar from other cases that might arise. In no sense does it commit this court to any conclusion in respect of those cases. It is not even a dictum on the question of the rights of domiciled aliens. The political power of Congress to deal with the admission of foreigners and entrust the supervision to executive officers is laid down in the broadest terms on page 659 of the same opinion.

In the case of *Fong Yue Ting* (149 U. S., 705) Mr. Justice Gray quoted from the *Ekiu Case* (142 U. S., 659) as follows:

> It is an accepted maxim of international law that every sovereign nation has the power, as inherent in

> sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. In the United States this power is vested in the National Government, to which the Constitution has committed the entire control of international relations, in peace as well as in war. It belongs to the political power of the Government and may be exercised either through treaties made by the President or Senate, or through statutes enacted by Congress.

The same was held in *Chae Chan Ping* v. *United States* (130 U. S., 606, 607), the court saying:

> The power of the Government to exclude foreigners from the country, whenever in its judgment the public interests require such exclusion, has been asserted in repeated instances, and never denied by the executive or legislative departments.

This court said:

> The right of a nation to expel or deport foreigners who have not been naturalized or taken any steps toward becoming citizens of the country rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country. (*Fong Yue Ting* v. *United States*, 149 U. S., 707.)

It held this right to be inalienable. (*Idem*, p. 711.)

The fact of acquiring a domicile could not nullify this inalienable sovereign right.

An alien could acquire no vested right to return to this country. (*The Chinese Exclusion Case*, 130 U. S., 589.) It was held in the case of *Fong Yue Ting* (149 U. S., 724) that foreigners, while permitted to remain in this country,

have the protection of the laws, but that they may be expelled even though they have acquired a domicile.

The argument in appellant's brief proceeds upon the line that foreigners, because, while they are permitted to remain in the country, they are entitled to the same protection as citizens, have thereby acquired such a status and consequent vested rights, that they must be dealt with by the Government as to exclusion the same as if they were citizens. In short, if Congress could not exclude the citizens of the United States at ports of entry so as to cut off the intervention of courts, it could not do so in respect of an alien who had acquired a domicile in this country. The idea is that, because an alien within the United States is protected in life and property by due process of law, he carries away with him the protection of the laws, and when he seeks to reenter can appeal to them to nullify any act restricting his admission which would discriminate between him and a citizen of the United States.

The brief says (p. 7):

> Assuming, therefore, as it would seem under the decisions of this court we are warranted in doing, that, so far as protection under the Constitution and laws of this country is concerned, foreign residents and citizens stand on an equal footing, the question resolves itself into this: Is it "due process of law" to leave the right of a citizen to enter this country to the arbitrary will of a collector of customs without an opportunity to appeal from his decision to a court?

If aliens acquire and export and reimport all of the rights of American citizens, there is an end of the argu-

ment. Such an extension of the principle of protection while in this country is claimed now perhaps for the first time.

An alien by grace of the Government takes up a residence in this country which requires no formality, but is simply a question of intention. While here the law shields him as it does the citizen. He returns to his own country and when confronted, on his attempt to return to the United States, by an act of Congress providing a special extrajudicial method of determining whether this Government has consented to his readmission, he declares the act unconstitutional and on the ground that he has the same rights to return that a citizen of the United States has, and the same appeal to the courts, and that Congress can not abridge them.

This contention can not be reconciled with the principles established by this court in the cases above cited.

III.

The act of August 18, 1894, was intended to apply to such cases as the one presented in the petition.

The construction sought to be put upon it for appellant is as follows:

Aliens who are excluded from admission by any law must apply to the collector of customs for entry, and if he decide adversely, such finding is conclusive, unless reversed, on appeal, by the Secretary of the Treasury.

Aliens who claim that they are not excluded from admission by any law must apply to the collector of customs for entry, and if he decide adversely, such finding is

not conclusive, there need be no appeal, and the courts may try anew upon a petition for habeas corpus, the question whether or not he belonged to the exempted classes.

Petitioner claims that he is a merchant, who has acquired a domicile, and that he is not excluded by any law and has the right to reenter without any certificate, and that upon an adverse finding by the collector he may, without appeal to the Secretary of the Treasury, be discharged from detention, and with the effect of being admitted into the United States.

The force of this contention is based upon the construction which accepts the words "is excluded from admission into the United States under any law or treaty" as a definition of classes, and draws the conclusion that such classes were alone to be affected by the acts, and that all other classes were not intended to be affected by it, but were to be left under the law as it then existed, and that as to them the action of the collector was not intended to be final. There is force in this claim, and it is strengthened by the words "admission of such alien," but carried to its logical conclusions, it makes the act practically almost ineffective. The effect of the claim is that the judgment of a court, clothed with final jurisdiction over cases cognizable by it, must be considered final only in cases which another court, with no power to review for errors, and in a proceeding not intended for the correction of errors, shall adjudge to have been determined correctly upon the facts.

The manifest purpose of the act was to make the action of collectors of customs, charged with the duty of admit-

ting or excluding aliens, final, unless reversed by the Secretary of the Treasury, and to make this purely a political question and withdraw it from the jurisdiction of the courts, as it had been decided could be done in the cases of *Nishimura Ekiu* (142 U. S., 662) and *Fong Yue Ting* (149 U. S., 728). It may be asked why, if this was the purpose, did not Congress simply say that the action of the collector excluding aliens shall be final unless reversed by the Secretary of the Treasury, and why were the words, "excluded from admission into the United States under any law or treaty" inserted, and why are they not, under the construction contended for, surplusage?

The answer is that, without some such qualifying words, the collector might assume jurisdiction in respect of any alien, and his action would be final. It will be observed that this act is not limited to Chinese nor to the enforcement of the Chinese exclusion acts. It covers all aliens who may fall within prohibited classes, and it applies not only to collectors of customs, who have exclusive jurisdiction over Chinese, but to "immigration" officers who deal with others than Chinese. Attention is called to the scope of the act in appellant's brief, page 18. The purpose of the act was not to withdraw any classes, who were within the primary jurisdiction, from the final conclusions of such jurisdiction, but to guard against the officers exercising final judgment in respect of aliens who did not under any law come under their jurisdiction.

This construction harmonizes the operation of the Chinese immigration laws with the act of 1891 (26 Stat., 827), which was sustained in the *Nishimura Case* (142 U. S., 659).

The same character of question necessarily arose under the act of 1891. The act excluded certain classes, such as idiots, insane persons, paupers, or persons likely to become a public charge, persons suffering from a loathsome or a dangerous contagious disease, persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude.

Others were not included, but all immigrants were subjected to the jurisdiction, as in this case all Chinese are. Here were classes excluded and classes not excluded, and belonging to the same nations, and nations having treaties with this country.

By section 8 of the act of 1891 the right to land is investigated, not the right merely of those excluded, but the right of all immigrants, including those not belonging to excluded classes.

The finding of the inspectors in classifying and in excluding is final, unless reversed by the Secretary of the Treasury. This act was sustained by this court, and it refused to inquire into the facts passed upon by this special tribunal.

The classes existed in fact when the investigation began. They were established in law when it was finished. There may have been a wide variance between the classes in fact and those in law, but that did not give those who were in fact without the contemplation of the law a standing in court to reverse the practical operation of the law. The purpose of the creation of the tribunal was to ascertain these classes finally. It was a court as much as assessment officers and equalizing boards are courts, and they had

their day and must submit even to an erroneous decision. If this be not what was intended by Congress in passing the act of August 18, 1894, and making the action final, what incongruities follow?

The tribunal confessedly has jurisdiction (for it will hardly be contended that a Chinese merchant can defy all investigation by the collector), but only to find in favor of the applicant. The Secretary of the Treasury is bound to hear an appeal, but only to reverse the finding of the collector.

This simply reduces the action of this tribunal which has jurisdiction to a nullity, for it is a power of decision with no alternative.

If the contention be sound, then no action of the collector and Secretary would be final, for every person claiming to be wrongly classed could try that question in court.

This right was denied in the Nishimura Case, and there is no real ground for distinction.

Under the operation of both acts the classes are to be determined by an investigation of facts upon evidence, and the personal status of each applicant must be fixed.

Under the one the questions relate to occupation and previous residence, and under the other to condition respecting person and property and previous conduct.

The credibility of witnesses is necessarily involved in both. The courts, if they interfered, would under both acts have to try the same classes of questions and the identical ones passed upon by inspectors and collectors.

This act was passed in relation to, and must be construed in *pari materia* with prior acts in force upon the

same subject. It operates as a repeal of section 5 of the act approved May 5, 1892 (27 Stat., 25), which allowed the writ of habeas corpus in behalf of a Chinese person seeking to land in the United States.

The act of May 5, 1892, continued in force for a period of ten years all laws then existing prohibiting and regulating the coming of Chinese into this country.

The act of July 5, 1884 (23 Stat., 115), forbade the immigration of Chinese laborers for ten years, but made exceptions in favor of those who were admitted into the country within ninety days after the passage of the act, and permitted, upon certain conditions, Chinese laborers to return to this country. By sections 3, 6, and 8 of said act the evidence of the right of a Chinese person to enter into the United States must be produced to the collector of customs.

By section 9 of the act approved May 6, 1882 (22 Stat., 60), which section is unamended by the act of 1884, the collector shall examine such persons and compare the evidences of their right to enter, "and no passenger shall be allowed to land in the United States from such vessel in violation of law." Thus the collector of customs must pass primarily upon the right of laborers and all other persons not within the exempt classes to enter, and an appeal lies to the Secretary of the Treasury. The duty to determine the right to enter, which depends upon a certain status, involves the right to adjudge the status, and necessarily the possibility of committing error.

The right to admit upon a proper showing includes the right to exclude in its absence. To exclude laborers,

including those who had gone out of the country, and merchants and others who did not produce proper evidence of their right to enter, and merchants who had acquired a domicile and had abandoned it, leaving no business and having, when they left, no intention of returning, and pretended merchants, such as hucksters, who had acquired a domicile and left a business with the intention of returning, but had never emerged from the labor class, necessarily involves an inquiry into the status of every Chinese person seeking entry into the United States.

The *Panzora Case* (51 F. R., 275), if sound, is not in point, because the persons discharged, not belonging at all to the immigrant classes, were not subject to the jurisdiction of the inspectors. But all Chinese of the laboring and merchant classes are subjected to the jurisdiction of the collector and he must pass upon their right of entry.

The *Martorelli Case* (63 F. R., 437) does not bear on this question, for he had taken out his first papers with the intention of becoming a citizen of the United States and clearly was not an immigrant, and came within the exception defined in the case of Fong Yue Ting. (149 U. S., 707.)

Judge Lacomb, who decided it, evidently did not consider it in point, for subsequently he decided the case of *Chin Yuen Sing* (65 F. R., 572) in accordance with the contention of the Government in this case, and he made no reference to the Martorelli Case and none to the decision of the district judge in the Panzora Case.

IV.

An act of Congress conflicting with a prior treaty is valid.

If the meaning of the act be clear, the fact that it may conflict with a treaty with China does not impair its validity.

A statute in contravention of a treaty with a foreign nation is not unconstitutional nor inoperative, but to the extent of conflict nullifies the operation of the treaty. (*Foster* v. *Neilson*, 2 Pet., 253, 314; *Edye* v. *Robertson*, 112 U. S., 580, 597–599; *Whitney* v. *Robertson*, 124 U. S., 190; *The Chinese Exclusion Cases*, 130 U. S., 600; *Fong Yue Ting* v. *United States*, 149 U. S., 720; *Horner* v. *United States*, 143 U. S., 576.)

V.

It is claimed that the act of August 18, 1894, does not apply to appellant, because having acquired a domicile in America he was not an "alien" within the meaning of the act.

The contention up to this point has been that the word "alien" in the act is connected with the words "is excluded from admission," etc. In that view it makes no difference whether a broad or narrow signification be given to the word "alien," for in no respect would it apply to petitioner if he be a merchant. If the construction contended for by appellant, that the act allows judicial proceedings in a case like this, be correct, then the scope of the word "alien" in the act is immaterial. On the other hand, if it be held that the collector had

jurisdiction to pass upon the rights of all Chinese, and that his action until reversed by the Secretary of the Treasury is final, the meaning of the word "alien" in the act is likewise immaterial.

It is not here claimed by the Government that appellant in fact is an alien, "excluded from the United States under any law or treaty," but that this question has been finally adjudicated by a court of competent and final jurisdiction. It is not now a question as to what persons were intended to be excluded. The act of August 18, 1894, does not extend the exclusion acts, nor make any new classes, nor add any requirements as to proof. All of these are unchanged. It simply makes a finding conclusive which before was reviewable by the courts.

In this respect it differs from the case of *Lau Ow Bew* (144 U. S., 59), relied on by appellant as being conclusive of this question.

In that case, while, Lau Ow Bew was on a visit to China, having a right to return, Congress required all Chinese merchants "who shall be about to come to the United States" to produce a certificate of a certain character, and this court held that one who was domiciled in this country and had left on a visit was not "about to come to the United States" for the first time, which was the sense in which the words were used, and that the act did not apply to Lau Ow Bew. At that time the action of the collector was reviewable. The act under consideration here took away this remedy. The case, then, is very different. A change of court or tribunal or the rules of procedure before which a foreigner may litigate is not an abridgment of his rights.

There is no vested right even in a citizen to litigate in a particular court or under particular rules of evidence. (Hopt *v.* Utah, 110 U. S., 590.)

The rights of a person are one thing and the forum for asserting them is another thing.

The case of *Chew Heong* (112 U. S., 536) was a case where his personal rights would have been affected by a narrow construction, and this the court avoided. Appellant went abroad, subject to have his right to return passed upon, and while he was away a law was passed which limited the investigation to a special tribunal.

His rights are the same. The change is only in the mode of vindicating them.

J. M. DICKINSON,
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